IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO 3711 OF 2003
IN
SUIT NO.3962 OF 2003

ITC Limited ...Plaintiffs.
Vs.
M/s Tarun Products
And others ....Defendants

Mr. Rahul Chitnis with Mr.P.P. Paul for the plaintiffs.

None for the defendants.

CORAM : ANOOP V.MOHTA J.

DATE : 7TH OCTOBERE, 2005.

P.C.

. This notice of motion has been taken out by the plaintiffs in a suit filed under the provisions of Trade Marks and Merchandise Act, 1999 (for short Trade Mark Act) r/w Copyright Act (Copyright Act) with basic prayers, revolving around the Trade Mark "mint-o and its wrapper ". The defendants' wrapper has the same colour combination with similarly styled words and an additional small words in oval circled boundary "Tarun's" above "mint" the word "Mint" and in place of "O" as "O" shaped white colour tablet photograph is shown. The plaintiffs immediately after getting

information and knowledge of the illegal use and sale of the deceptively similar products by the defendants filed a suit on 1st December, 2003, with the notice of motion in question for urgent reliefs.

2. By ad-interim order dated 18/12/2003, after considering the positive assertion and prima face case, as made out by the plaintiffs, the learned single judge has granted ad-interim relief as per prayer clause (a), which reads as under:

" (a) That pending the hearing and final disposal of the suit, the defendants by themselves, their servants, agents and associate concerns/firms be restrained by an order and injunction of this Hon'ble Court from in any manner using in relation to mint based mouth freshners/lozenges/sugar confectionery or any other confectionery/edible articles, the trade mark "Tarun's mint-o" and/or "MINTO" and/or wrapper being Exhibiits C1 to C2 hereto or any other trade mark or wrapper or label so as to pass of or enable others to pass of the defendant goods as and for the goods of the plaintiffs".

3. The copy of notice of motion as well as the suit, as contended have been served even before 18/12/2003. The Counsel appearing as per instructions for the plaintiff, undertakes to file an affidavit of service in the present matter. The matter has been on board but none appeared for the defendants again. The

learned Counsel appearing for the plaintiff further makes a statement that the ad-interim order dated 18/12/2003 remained intact. No one carried the same in appeal. There is no application of any sort, filed to vacate the said ad-interim order. Admittedly, there is no affidavit-in-reply to this notice of motion filed till this date. The ad-interim order dated 18/12/2003 has been in operation since then. The matter reached and heard today for the final hearing. None appeared for the defendants again.

4. The basic aspect which cannot be overlooked at this stage is the existence of plaintiffs product in the market, since 1989, as referred in para 6 of the plaint. The product as referred having distinctive trade mark "mint-o" in respect of mouth freshners/lozenges/sugar confectionery. The plaintiffs devised and used distinctive wrapper bearing the said trade mark in blue and white colour. These wrapper have a distinctive colour scheme, lay out and get up and they are associated by the traders and members of the public with the plaintiffs exclusively. Various variants of mint based mouth freshners/lozenges/sugar confectionery bearing the trade mark "mint-o" along with the words

such as "peppermint", "after smoke" "all mint no hole" and "fresh", are being sold and marketed for several years by the plaintiffs. The update applications for registration of the said trade mark "mint-o" under the Trade and Merchandise Marks Act, 1958 are also referred in the plaint. The plaintiffs have filed an additional representations for variations of the above marks, after the assignment dated 9th March, 2002. The plaintiffs have by extensive advertisements promoted the mint based freshners/lozenges/sugar confectionery in question. The plaintiffs have relied upon the advertisements published by the plaintiffs and the promotional material issued by the plaintiffs to promote the trade mark "mint-o" by displaying various hoarding and/or banners in or around the city of Mumbai. These averments have remained uncontroverted till this date.

5. The plaintiffs have applied for the Registrate for "Sugar Confectionery" with a specific picture, shape and word "Mint". The said Sugar Confectionery having typical coloured wrapper with distinct shaped words "mint" acquired distinctiveness. This colour averments, size shape and design of the marks, at this stage definitely tilts the balance of convenience in favour of

the plaintiff.

6. The learned Counsel has pointed out page 26 Exh.1A. It refers to the trade mark of the plaintiffs' company, having dark blue colour shed with styled words "mint-o". The colour and make of the second wrapper in question is arranged in same fashion but basically yellow and orange colour with the same shading combination. The adjacent to small word "mint" there is a similar size blue circle on the second wrapper. The size of small circle is blue with the same combination as referred at page 35 and 36 of the defendants marks. the defendants' wrapper at page 36 reference to blue colour mark in identical and deceptively similar colour combination of dark & faint blue shading. The word "mint" shows the same style. The figure of the word "mint" is also quite similar to the plaintiffs' mark. Another word "mint" on the defendants trade mark is on the top of the white circle tablet. so called white tablet refers the word "Tarun". The small word "mint" is about tablet size in white colour. The word on the top of the main word "mint" and basically the equal size of first word similar the word "Tarun" is mentioned in small letters. The same is with orange colour wrapper

at page 35.

7. After going through both these trade marks and the material placed on the record, as referred above, one cannot overlook that the market of the confectionery product and the consumer are common. Therefore, there is no doubt that the confectionery product of the defendant with the same colour combination and design, in the common market or marketed may be sold as product of the plaintiffs.

8. A reference is also made about the criminal proceeding pending in the Metropolitan Magistrate 27th Court at Mulund, Mumbai, thereby the provisions of section 63 of the Copy Right Act, r/w Section 103, and 104 of Trade Mark Act and Section 420,483,485,487 and 120B of the Indian Penal Code have been referred as is pending since 9th October, 2003. It appears that based on the order passed by the learned Magistrate, the raids have been carried out and thereby seized sizable quantities of the defendants products. The plaintiffs apprehension and averments in reference to the irreparable harm, loss and injury to their business on account of the acts of passing off and infringement of

copy right committed by the defendants cannot be overlooked.

9. In view of this, I see there is a reason that the plaintiffs should be protected of under Trade Mark Act and Copy Right Act. All the ingredients as contemplated under the acts are answered, as explained by the Supreme Court in the various judgments dealt with such issues. All ingredients of order 40 Rule 1 of C.P.C. r/w Order 39 Rule 1 and 2 are also made out. Taking all this into account I have no hesitation to confirm the order dated 18/12/2003, passed in the present notice of motion, as no other relief pressed at this stage. In view of this, notice of motion is made absolute in terms of prayer clause (a).

. Notice of motion is disposed of accordingly.

[ANOOP V. MOHTA, J.]